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COMMON LAW AND LEGISLATION.

NOT the least notable characteristics of American law today are the excessive output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers. Text-writers who scrupulously gather up from every remote corner the most obsolete decisions and cite all of them, seldom cite any statutes except those landmarks which have become a part of our American common law, or, if they do refer to legislation, do so through the judicial decisions which apply it. The courts, likewise, incline to ignore important legislation; not merely deciding it to be declaratory, but sometimes assuming silently that it is declaratory without adducing any reasons, citing prior judicial decisions and making no mention of the statute.[1] In the same way, lawyers in the legislature often conceive it more expedient to make of a statute the barest outline, leaving details of the most vital importance to be filled in by judicial law-making.[2] It is fashionable to point out the deficiencies of legislation and to declare that there are things that legislators cannot do try how they will.[3] It is fashionable to preach the

[1] See address of Amasa M. Eaton, Proceedings of Seventeenth Annual Conference of Commissioners on Uniform State Laws, 45.

[2] *E. g.*, the Sherman Anti-Trust Act, also Senator Knox's plan for an Employers' Liability Act.

[3] For examples from the juristic literature of the past two years, see Carter, Law, Its Origin, Growth and Function, 3; Parker, The Congestion of Law, 29 Rep. Am. Bar Ass'n, 383; Parker, Address as President of the Am. Bar Ass'n 1907, 19 Green Bag 581; Dos Passos, The American Lawyer, 169; Hughes, Datum Posts of Jurisp., 106; 2 Andrews, Am. Law, 2 ed., 1190.

superiority of judge-made law.[1] It may be well, however, for judges and lawyers to remember that there is coming to be a science of legislation and that modern statutes are not to be disposed of lightly as off-hand products of a crude desire to do something, but represent long and patient study by experts, careful consideration by conferences or congresses or associations, press discussions in which public opinion is focussed upon all important details, and hearings before legislative committees. It may be well to remember also that while bench and bar are never weary of pointing out the deficiencies of legislation, to others the deficiencies of judge-made law are no less apparent. To economists and sociologists, judicial attempts to force Benthamite conceptions of freedom of contract and common law conceptions of individualism upon the public of today are no less amusing — or even irritating — than legislative attempts to do away with or get away from these conceptions are to bench and bar. The nullifying of these legislative attempts is not regarded by lay scholars with the complacent satisfaction[2] with which lawyers are wont to speak of it. They do not hesitate to say that "the judicial mind has not kept pace with the strides of industrial development."[3] They express the opinion that "belated and anti-social" decisions have been a fruitful cause of strikes, industrial discord, and consequent lawlessness.[4] They charge that "the attitude of the courts has been responsible for much of our political immorality."[5]

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[1] An excellent example may be seen in the Introduction (by Judge Baldwin) to Two Centuries' Growth of American Law.

[2] *E. g.*, a recent writer, assuming that certain common law doctrines as to procedure inhere in nature, points out that despite legislative attempts to get away from them, courts have preserved them. This is assumed to show that the legislature had attempted the impossible. 2 Andrews, Am. Law, §§ 646, 684. Of course, one might answer that there are jurisdictions where such legislation has been given effect by the courts. Gartner *v.* Corwine, 57 Oh. St. 246; Rogers *v.* Duhart, 97 Cal. 200. One might also say that if courts had been as zealous to enforce the spirit of the New York Code of 1848 as they were to graft common law upon it and to show that its leading ideas could not be carried out, the cases might tell another story.

[3] Kelley, Some Ethical Gains through Legislation, 142. See also Seager, Introduction to Economics, § 236.

[4] *Ibid.* 144, 156.

[5] Smith, Spirit of Am. Gov., c. xii. Professor Smith says: "By protecting the capitalist in the possession and enjoyment of privileges unwisely and even corruptly granted, they have greatly strengthened the motive for employing bribery and other corrupt means in securing the grant of special privileges. If the courts had all along held that any proof of fraud or corruption in obtaining a franchise or other legislative grant was sufficient to justify its revocation, the lobbyist, the bribe-giver and the 'innocent purchaser' of rights and privileges stolen from the people, would have found

There are two ways in which the courts impede or thwart social legislation demanded by the industrial conditions of today. The first is narrow and illiberal construction of constitutional provisions, state and federal. "Petty judicial interpretations," says Professor Thayer, "have always been, are now, and will always be, a very serious danger to the country." [1] The second is a narrow and illiberal attitude toward legislation conceded to be constitutional, regarding it as out of place in the legal system, as an alien element to be held down to the strictest limits and not to be applied beyond the requirements of its express language. The second is by no means so conspicuous as the first, but is not on that account the less unfortunate or the less dangerous. Let us see what this attitude is, how it arose, and why it exists in an industrial community and an age of legislation.

Four ways may be conceived of in which courts in such a legal system as ours might deal with a legislative innovation. (1) They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them. (2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or co-ordinate authority in this respect with judge-made rules upon the same general subject. (3) They might refuse to receive it fully into the body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover. (4) They might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly. The fourth hypothesis represents the orthodox common law attitude toward legislative innovations. Probably the third hypothesis, however, represents more nearly the attitude toward which we are tending. The second and first hypotheses doubtless appeal to the common law lawyer as absurd. He can hardly conceive that a rule of statutory origin may be treated as a permanent part of the general

the traffic in legislative favors a precarious and much less profitable mode of acquiring wealth." 329-330.

[1] Thayer, Legal Essays, 159.

body of the law. But it is submitted that the course of legal development upon which we have entered already must lead us to adopt the method of the second and eventually the method of the first hypothesis.

Strict or liberal interpretation of statutes is by no means the whole question. Even when statutes are not avowedly given a strict construction, as being in derogation of the common law, courts refuse to treat the rules established by legislation as parts of the law. They are conceded to be applicable to certain cases because the legislature clearly said so, but they are not conceived of as entering into the legal system as an organic whole. They are not regarded as at all co-ordinate with common law rules *in pari materia*. If any piece of legislation has become universal in common law jurisdictions, it is Lord Campbell's Act. That Act, too, has been in force long enough to have been thoroughly incorporated into the law. But the Supreme Court of the United States still thinks of it as introducing a sort of temporary innovation which is not at all to be thought of as on the same footing with common law doctrines.[1] And in the same spirit the Supreme Court of Missouri lays it down that while every physical interference with the person of another short of killing is presumptively wrongful and calls for justification, a killing is not presumptively wrongful but must be shown to have been wrongful by the party complaining, because it gave rise to no action at common law.[2] Strict construction is only a feature, therefore, although the most unfortunate feature, of the common law attitude toward legislation.

We are told commonly that three classes of statutes are to be construed strictly: penal statutes; statutes in derogation of common right; and statutes in derogation of the common law. An eminent authority has objected to all of these categories and has pointed out that all classes of statutes ought to be construed with a sole view of ascertaining and giving effect to the will of the lawmaker.[3] But there is more justification for some of these categories

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[1] Chambers *v.* B. & O. R. Co., 207 U. S. 142, 149.

[2] Nichols *v.* Winfrey, 79 Mo. 544. In the same way, if a statute makes a sale or a contract void upon grounds not declaratory of the common law, one who depends on that ground must plead it specially. Finley *v.* Quirk, 9 Minn. 194. But if what would otherwise be a contract is void at common law or because of an act declaratory of the common law, advantage of the defense may be taken under the general issue. Oscanyon *v.* Arms Co., 103 U. S. 261.

[3] "The idea that an act may be strictly or liberally construed, without reference to the legislative intent, according as it is viewed either as a penal or a remedial statute,

than for others. For the rule that penal statutes are to be construed strictly something may be said. When acts are to be made penal and are to be visited with loss or impairment of life, liberty, or property, it may well be argued that political liberty requires clear and exact definition of the offense. So also the rule that statutes in derogation of common right are to be construed strictly has some excuse in England where there are no constitutional restrictions. There it is really another form of stating Blackstone's tenth rule, that interpretations which produce collaterally absurd or mischievous consequences are to be avoided.[1] In the United States it means that interpretations which would make an act unconstitutional are to be avoided, or else it is equivalent to Blackstone's tenth rule. Whenever it is applied beyond these limits, it is without excuse and is merely an incident of the general attitude of courts toward legislation. The proposition that statutes in derogation of the common law are to be construed strictly has no such justification. It assumes that legislation is something to be deprecated. As no statute of any consequence dealing with any relation of private law can be anything but in derogation of the common law, the social reformer and the legal reformer, under this doctrine, must always face the situation that the legislative act which represents the fruit of their labors will find no sympathy in those who apply it, will be construed strictly, and will be made to interfere with the *status quo* as little as possible. The New York Code of Civil Procedure of 1848 affords a conspicuous example of how completely this attitude on the part of courts may nullify legislative action.[2] Some regard this attitude toward legislation as a basic principle of jurisprudence.[3] Others are content to make of

either as in derogation of the common law or as a beneficial innovation, is in its very nature delusive and fallacious." Sedgwick, Construction of Const. and Stat. Law, c. viii, *fin.*

[1] 1 Bl. Comm. 91.

[2] "You have the State of New York before you as a terrible example. I believe our practice today is infinitely more technical than that in New Jersey. Even the attempt to abolish forms of action and especially the attempt to abolish the distinction between law and equity practice have been dismal failures. The distinction between trover and assumpsit is today even more rigidly observed than under the common law practice. It is impossible to amend upon a trial from trover to assumpsit or *vice versa*." W. B. Hornblower, quoted in 2 Andrews, Am. Law, 2 ed., § 635, n. 29. But the impossibility of amendment spoken of and the rigid distinction were introduced into code practice by the judges in the teeth of express code provisions upon common law considerations. De Graw *v.* Elmore, 50 N. Y. 1. See N. Y. Code Civ. Proc. 1848, §§ 69, 173, 176.

[3] Robinson, Am. Jurisp., § 301.

it an ancient and fundamental principle of the common law.[1] In either event they agree in praising it as a wise and useful institution.[2] It is not difficult to show, however, that it is not necessary to and inherent in a legal system; that it is not an ancient and fundamental doctrine of the common law; that it had its origin in archaic notions of interpretation generally, now obsolete, and survived in its present form because of judicial jealousy of the reform movement; and that it is wholly inapplicable to and out of place in American law of today.

That the attitude of our courts toward legislation is not necessary to and inherent in a legal system is apparent when we turn to a great legal system in which it is wholly unknown. Not only is this view of legislation unknown to Roman law,[3] but quite an opposite doctrine was established in Roman law countries even before they enacted codes.[4] "Where a gap has been left by any statutory rule, it is filled up, according to this method, by reference to another rule, contained in the same statute, in connection with which a point left open in the first mentioned rule is expressly provided for, and the *ratio juris* of the last mentioned expression is taken to be a general rule of law applicable to all cases."[5] In other words, statutes are taken to be parts of the law for all purposes. The courts reason from them by analogy the same as from any other legal rules.[6]

Legislation has not been regarded always as a mere supplement to or eking out of common law or customary law. On the contrary, an older view was that enacted law was the normal type, and customary law a mere makeshift to which men resorted for want of enactment to prevent a failure of justice. As Roman law after Justinian was a body of enactments, this idea is very prominent from the sixth century to the rise of the school at Bologna in the

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[1] *E. g.*, Carter, Law, Its Origin, Growth and Function, 308.

[2] Dr. Robinson says of the proposition that statutes in derogation of the common law are to be construed strictly that it is "a positive but reasonable rule." Am. Jurisp., § 301. Mr. Carter says that judges "displayed their wisdom" by adopting it.

[3] See, for example, Digest, I, 3, 12, I, 3, 13, and I, 3, 27.

[4] Dernburg, Pandekten, I, § 35.

[5] Schuster, German Civil Law, § 17.

[6] Salkowski, Institutionen, § 5; Windscheid, Pandekten, 8 ed., §§ 20, 22. This is true also of the canon law. The canonist "did not mean to exclude from his common law all rules imposed by a legislator. Far from it. Before the middle of the thirteenth century the most practically important part of his common law was statute law, law published by a legislator in a comprehensive statute book." Maitland, Canon Law in the Church of England, 4.

twelfth. Whereas Gaius [1] wrote, "*constant autem jura . . . ex legibus*," etc., classing statutes as one form of law, we find that *lex* (statute) has become the living word and that enactment is felt to be the true law.[2] After the revival of legal studies in the twelfth century there were nearly five hundred years during which, in the empire at least, the *Corpus Juris*, as legislation of the emperor, Justinian, was supposed to be binding statute law.[3] Hence written law or enactment was regarded as the type of law, and custom was said to be a certain kind of law which is taken for enactment when enactment is wanting.[4] The title *De Legibus et Consuetudinibus*, borne both by Glanvill's treatise and by Bracton's, and the argument Glanvill feels compelled to make to show that England has laws although the rules administered by the king's judges are not enacted,[5] make it evident that continental ideas as to the nature of law were taken for granted. Even after the theory on the Continent had changed, Hale shows the influence of the older notion in arguing that the rules of the common law had their origin in forgotten statutes.[6] But the rise and development of a vigorous body of judge-made law in the king's courts and the feebleness and paucity of legislation from Edward II until Henry VIII, rendered such a theory wholly inapplicable to England; and the seventeenth century, which saw not a little vigorous legislation in England, saw also the end of the theory of statutory force of the *Corpus Juris* upon the Continent. As legislation was in point of fact a relatively unimportant element throughout the growing period of our legal system, it was natural that statutes should come to be regarded as furnishing rules for particular, definite situations, but not princi-

[1] Gaius, I, § 2.

[2] See the formulas of Isidore, 2 Bruns, Fontes Iuris Romani Antiqui, 83, adopted by Gratian, CC. 2–5, Dist. 1. See also the formulas in the *Expositio Terminorum* appended to *Petri Exceptiones* and in the related *Libellus de Verbis Legalibus*, Fitting, Juristische Schriften des früheren Mittelalters, 164, 181.

[3] 2 Stintzing, Geschichte der deutschen Rechtswissenschaft, 165–188.

[4] Thus Gratian, C. 5, Dist. 1. Of course I am speaking here of juristic theory. The facts were doubtless otherwise. See Jenks, Law and Politics in the Middle Ages, c. i.

[5] Glanvill, Preface, Beale's edition, xxviii–xxix.

[6] "And doubtless many of those Things that now obtain as Common Law had their Original by Parliamentary Acts or Constitutions . . . though those Acts are now either not extant or, if extant, were made before Time of Memory. . . . And were the rest of those Laws extant, probably the footsteps of the Original Institution of many more laws that now obtain merely as Common Law, or Customary Laws by immemorial Usage, would appear to have been at first Statute Laws or Acts of Parliament." Hale, History of the Common Law, c. i.

ples for cases not within their tenor, or from which to reason by analogy.[1] And the tendency to conceive of a statute as something exceptional and more or less foreign to the body of legal rules in which legislation had endeavored to insert it, which such a doctrine fostered, was furthered by the growth of an idea of limitations upon legislation which, through our doctrine of judicial power over unconstitutional legislation, has become very strong in America.

Independent of express constitutional limitations, there are five forms in which the courts have considered the question of limitations upon legislative power: (1) conflict of legislation with natural law; (2) interference of a temporal legislator in spiritual affairs; (3) attempts of Parliament to derogate from the royal prerogative prior to the Bill of Rights; (4) conflict of legislation with rules of international law; and (5) friction between the terms of a statute and the doctrines or principles of the common law. Each of the four first deserves attention in considering the last.

In the thirteenth century the Germanic principle, that the state was bound to act by law, coming in contact with the revived classical idea that the state exists of natural necessity for the general welfare, toward which law is but a means, so that the state creates law instead of merely recognizing it, led men to take up once more the distinction of natural law and positive law.[2] Positive law was the creature of the sovereign. But all sovereigns were subject to natural law, and their enactments in conflict therewith were simply void. This philosophical theory, made over so as to bring it into accord with theology, was given currency by Thomas Aquinas.[3] Coke, in Bonham's Case,[4] cites two cases of the reign of Edward III as deciding that an act of Parliament against common right and reason is void. As natural law "is called by them that be learned in the law of England the law of reason,"[5] it might be supposed that these were early attempts to put the theologico-philosophical

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[1] The phrase "common law" was borrowed from the canonists in the thirteenth century, meaning, both in its lay and in its ecclesiastical use, general, as opposed to local, law and custom. The use of "common law" in contrast to "statute law" is later, arising from the circumstance that statutes were rare. Maitland, Canon Law in the Church of England, 4.

[2] Gierke, Political Theories of the Middle Age, 73, 74.

[3] Summa Theologiae, 1, 2, q. 91, art. 2, and q. 93, art. 1.

[4] 8 Reports 118 *a*.

[5] Doctor and Student, Introduction. This follows Thomas Aquinas, who held that "that part of the eternal law which man's nature reveals is to be called natural law." Summa Theologiae, 1, 2, q. 91, art. 1.

theory into practice. But it seems pretty clear that they will not bear the construction which Coke gave to them. In the first, Tregor's Case [1] (1334), Herle, J., said: "Some statutes are made against law and right, which when those who made them perceiving, would not put them in execution." [2] "Statutes made against law" looks very like statutes made against the law of nature. But the refusal of "those who made them" to execute them shows rather a sort of crude dispensing power, such as administrative officers exercise even today with respect to unpopular legislation. In the other,[3] a case of 33 Edward III (1359), Coke tells us in Bonham's Case that the judges decided contrary to an express provision of the Statute of Westminster Second "because it would be against common right and reason." The statutory provision,[4] however, does not seem to be express on the point decided, and one must feel that the explanation given in the Second Institute, namely, that "otherwise the act should be contrary to itselfe, which in all expositions is to bee avoided," [5] is preferable. Fortescue (between 1453 and 1471) concedes the universal validity of natural law,[6] and feels bound to demonstrate jury trial "legi divino non repugnare." [7] In Doctor and Student (before 1563) it is laid down absolutely that "if any general custom were directly against the law of God, or if any statute were made directly against it, as, if it were ordained that no alms should be given for no necessity, the custom and statute were void." [8] Two cases of the reign of Elizabeth are cited by Coke in Bonham's Case as holding void a statute of Edward VI [9] because "it would be against common right and reason." But these cases evidently refused to apply a reservation in the statute according to its literal terms because of a mischievous and absurd result involved. In other words, the court applied Blackstone's tenth rule. The dicta in Bonham's Case that "when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void," [10] appear to be the first expositions of this theory in the reports. In Finch's Law (1636), however, it is set forth dogmatically: "Therefore Lawes

[1] Y. B., 8 Ed. III, 30.
[2] Bonham's Case, 8 Reports 108 *a*, 118 *a*.
[3] Fitzh. Abr., Cessavit, 42; Fitzh., Natura Brevium, 209 F.
[4] Stat. Westm. II, cap. 21.
[5] 2 Inst. 402.
[6] De Laudibus Legum Angliae, cap. 16.
[7] *Ibid.* cap. 32.
[8] Dial. I, c. 6.
[9] 1 Edward VI, cap. 14.
[10] 8 Reports 107 *a*, 118 *a*.

positive, which are directly contrary to the former [the law of reason] lose their force, and are no Lawes at all. As those which are contrary to the law of Nature. Such is that of the Egyptians, to turne women to merchandize and commonwealth affaires and men to keepe within dores." [1] Lord Holt (1701) in City of London *v.* Wood [2] approves the dicta in Bonham's Case and puts as an illustration that "an act of Parliament may not make adultery lawful." Finally, Blackstone (1765) begins by laying down the theory of natural law emphatically. He says: "This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other . . . no human laws are of any validity if contrary to this." [3] But when he comes to apply it to legislation, he retracts. He cannot accept the dicta in Bonham's Case nor Lord Holt's approval thereof, but admits that "if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution to control it." [4] It has been shown that this change of view was a result of the revolution of 1688.[5] Since that event, courts "have no authority to act as regents over Parliament or to refuse to obey a statute because of its rigor." [6]

Except as constitutional limitations are infringed, the same doctrine obtains in America.[7] But there are dicta that the superior obligation of the law of nature must be given effect,[8] and an eminent judge has declared that there are, apparently apart from constitutional restrictions, individual rights to which courts must give effect "beyond the control of the state." [9] The example which he gives, however, that "no court . . . would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter

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[1] Finch, Law, B. I, c. 6.

[2] 12 Mod. 669, 687.

[3] 1 Bl. Comm. 41.

[4] 1 Bl. Comm. 91.

[5] Coxe, Judicial Power and Unconst. Legislation, 179.

[6] Willes, J., in Lee *v.* Bude & T. J. R. Co., L. R. 6 C. P. 576, 582.

[7] Cooley, Const. Lim., 200; Bertholf *v.* O'Reilly, 74 N. Y. 509; Orr *v.* Quimby, 54 N. H. 211.

[8] Jeffers *v.* Fair, 33 Ga. 367; Lanier *v.* Lanier, 5 Heisk. (Tenn.) 572.

[9] Miller, J., in Loan Ass'n *v.* Topeka, 20 Wall. (U. S.) 655, 662. *Cf.* Marshall, C. J., in Fletcher *v.* Peck, 6 Cranch (U. S.) 87: "The estate having passed into the hands of a purchaser for a valuable consideration without notice, the state of Georgia was restrained either by *general principles which are common to our free institutions* or by the particular provisions of the constitution of the United States from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."

be the husband of C, and B the wife of D," is viewed otherwise by Lord Holt in City of London *v.* Wood,[1] who says that Parliament " may make the wife of A to be the wife of B," though he agrees that there are natural law limitations on legislative authority. This striking example of the purely personal and arbitrary character of all natural law theories,[2] demonstrates the impossibility of maintaining any such doctrine as that laid down by Coke in Bonham's Case. But there are those who maintain today that there are extra-constitutional limitations upon legislative power,[3] and some such feeling on the part of judges contributes not a little to the current attitude toward legislation.

Judicial limitations upon interference of the temporal legislator in spiritual affairs and upon attempts of Parliament to derogate from the royal prerogative prior to the establishment of the doctrine of parliamentary supremacy in 1688 have been discussed at length by Mr. Coxe.[4] The decisions he sets forth are the parents of the American doctrine of judicial power over legislation. They show that prior to the Reformation a distinction between temporal and spiritual powers was recognized and unquestioned [5] and that temporal legislation in purely spiritual matters was not binding on anyone because it dealt with matters over which the state had no power — it was *impartinent d'estre observé*.[6] Of course the lay courts had no power over such matters either. The decisions in these cases proceed, not on any inherent quality in legislation, but upon a separation of powers similar to that provided for by American constitutions. So also in the matter of legislative interference with the royal prerogative prior to 1688. The courts were the king's courts, administering his justice in his name by his writs. So long as his prerogative existed, they were bound to give effect to it quite as much as they were to give effect to legislation.[7] But the power of judging as to the validity of legislation to which these

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[1] 12 Mod. 669.

[2] " Nous pensons, qu'à part le droit positif, il n'existe que des opinions d'auteurs, qui répondent plus ou moins aux besoins de la société." Antoine, Introduction to Fiore, Nouveau Droit Internat. Public, ii. *Cf.* Bentham, Principles of Morals and Legislation, 17, n. 1.

[3] Hughes, Datum Posts of Jurisp. (1907), 106.

[4] Judicial Power over Unconst. Legislation, 121–164, 165–171.

[5] This distinction, recognized in the Constitutions of Clarendon and in Magna Charta, is stated very graphically in the Sachsenspiegel, B. I, art. 1.

[6] Fitzh. Abr., Annuity, 41.

[7] Godden *v.* Hales, Show. 475.

two situations gave rise contributed to produce the feeling that there is an indefinite, judicial, supervisory power over statutes.

International law stands to the law of each state in a relation quite analogous to that which the canon law occupied with respect to matters spiritual before the Reformation. It is a universal law, dealing with matters not of ordinary legal concern, although running into questions with which the local courts have to do so often and so closely that we hold it a common element of the municipal law of states. But in the same way the canon law, treating of matters which were not for the lay courts, at the same time found the lines between such matters and matters temporal hazy and difficult to draw, and may be said to have been to no less extent a common element in the municipal law of medieval Europe.[1] International law is in a sense a superior body of rules, not depending upon the will of any particular state, but imposed on all states, according to the theory one may adopt, by natural law or by the moral sentiment and public opinion of the civilized world. In the same way the canon law was a body of rules of superior authority, having behind it the sanctions of the church and of religion. But the separation of powers between national and international has not proceeded so far that courts are able to pronounce legislation contrary to the rules or principles of international law to be void or "impertinent to be observed." They have the power only to produce, so far as interpretation will allow, a harmony between the law of the state and the Law of Nations, just as lay courts formerly, without refusing to apply temporal legislation, "were willing to co-operate with the canonists in producing an harmonious result."[2] There are common law dicta that legislation cannot change a rule of international law.[3] These appear to proceed upon the theory that international law is the law of nature applied to international relations and hence is of superior authority to positive law.[4] To that extent, Lord Mansfield's dictum

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[1] Maitland, Canon Law in the Church of England, cc. ii, iii, and iv.

[2] *Ibid.* 75.

[3] In Heathfield *v.* Chilton, 4 Burr. 2015, Lord Mansfield said that Parliament not only did not intend to alter but "could not alter" the law of nations by stat. 7 Anne, c. 12. In The Scotia, 14 Wall. (U. S.) 170, Strong, J., said: "Undoubtedly no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can change the law of the world."

[4] "And as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice in which the learned of every

may be the last echo in England of Coke's doctrine in Bonham's Case. The view which has prevailed, however, is that the courts are to prevent interference of legislation with international law by interpretation; that to avoid a conflict between international law and a statute, the courts will resort, if need be, to strained and forced constructions.[1] On the Continent, where different views of the relation of courts to legislation obtain, it is significant that instead of discussing the duty of interpreting statutes so as to accord with international law, as do English and American authors, text-writers consider the duty of states to *change* their laws so as to bring them into harmony with the just demands of other states.[2] In other words, conflict between municipal law and international law may be avoided in any of three ways: (1) by holding law and legislation of a state at variance with international law void; (2) by construing legislation in derogation of international law strictly and avoiding departure therefrom by interpretation; (3) by changing local laws whenever at variance with the received usages of nations. In the analogous case of the canon law, the courts, when the second mode was not open, adopted the first.[3] Where international law is involved, with some suggestion that the first was admissible, they have come to take the second. Continental jurists adopt the third. It is evident that the case of statutes in derogation of international law is not analogous to that of statutes in derogation of the common law. In the former, we have two bodies of rules dealing with different relations which have a certain margin of contact. In the latter we have two forms of rules dealing with the same relations and making up one body of law; and the question is how they shall be adjusted to each other. If either may claim any superior authority, it is the legislative form, as the

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nation agree; or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject." 4 Bl. Comm. 66–67.

[1] Le Louis, 2 Dods. 210, 239; The Charming Betsy, 2 Cranch (U. S.) 64, 118. Hence if the statute leaves *no* room for interpretation, international law must give way. An interesting example may be seen in the Scotch case of Mortensen *v.* Peters, 14 Scots L. T. 227. See Gregory, The Recent Controversy as to the British Jurisdiction over Foreign Fishermen more than Three Miles from Shore, 1 Am. Pol. Sci. Rev. 410.

[2] 1 Fiore, Nouveau Droit Internat. Public, 351–354.

[3] Prior of Castle Acre's Case, Y. B., 21 Hen. VII, 1. Lyndwood asserts expressly that a statute upon a matter of spiritual cognizance without the approval of the church is invalid. Provinciale, 1679 ed., 263, n. i. The judges seem to have agreed.

later and more direct expression of the general will. But if this false analogy has not assisted directly in keeping up the common law attitude toward legislation, the further example of judicially imposed limitations upon statutes has not been without effect.

With respect to each of the four cases we have been considering it may be noted that the legislator was attempting to act beyond his province or to derogate from rules of superior authority. Hence his mandates were "impertinent to be observed." In our fifth case, friction between the terms of a statute and doctrines or principles of the common law, the case is otherwise. Here the legislator is within his own undoubted province, and his rules have the superior authority. Hence the courts could not entertain a suggestion that legislation contrary to the doctrines of the common law is invalid. Granting its validity, they have to consider whether they will interpret it liberally, giving full and free development to its policy and spirit, or narrowly and strictly, refusing to suffer any suspension or modification of the existing judge-made law beyond what the letter of the enactment dictates. "A statute is said to be construed strictly when it is not extended to cover anything that is not clearly within its express terms." [1] Such is the construction which our courts have been exhorted to apply [2] and have said they would apply to statutory intruders.[3] In other words, courts assume that legislatures are in the quiescent stage, as Dicey calls it,[4] although that stage has never obtained in America. We have seen certain analogies that contribute to the attitude this false assumption is invoked to justify. It remains to see how the doctrine as to statutory innovations upon the common law arose and what has kept it alive.

Archaic interpretation, like any other feature of archaic law, is formal, rigid, and arbitrary.[5] "In the barbarous stages of law,

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[1] Terry, Common Law, 8.

[2] Carter, Law, Its Origin, Growth and Function, 308.

[3] *E. g.*: "This statute is an innovation on the common law, and therefore will not be extended farther than is required by its letter." Look *v.* Miller, 3 Stew. & P. (Ala.) 13 (statute allowing a party to testify). "The courts will construe strictly laws in modification or derogation thereof, assuming that the legislature has in the terms used expressed all the change it intended to make in the old law, and will not by construction or intendment enlarge its operation." Hollman *v.* Bennett, 44 Miss. 322. Dr. Robinson cites this in 1900 as stating an elementary principle of American jurisprudence. Elements of Am. Jurisp., § 301.

[4] Law and Public Opinion in England, Lect. V.

[5] "The oldest law of the Romans recognized no will as in existence other than the spoken will, the *dictum*. What is not spoken is not willed, and *vice versa* only that is

courts thwart the intention of parties to transactions by rules and restrictions which are not based on considerations of public advantage, but are formal, arbitrary, and often of a *quasi*-sacred character."[1] What Mr. Justice Holmes has styled "the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to an intelligence fired with a desire to pervert,"[2] is a characteristic phase of the archaic conception of all legal institutions and transactions. Applied generally to legislation of all kinds, it has left a monument in the elaborate elucidations of the obvious in the first three sections of the English Interpretation Act.[3] Incarnate in a special, arbitrary rule of statutory construction, it has left a descendant in the doctrine we are considering. That rule is stated thus by Coke: "There is also a diversity betweene an act of Parliament in the *negative*, and in the *affirmative*; for an *affirmative* act doth not take away a custome, as the statutes of wills of 32 and 34 H. 8. doe not take away a custome to devise lands, as it hath beene often adjudged. Moreover there is a diversity betweene statutes that be in the negative; for if a statute in the negative be declarative of the ancient law, that is in affirmance of the common law, there aswell as a man may prescribe or alledge a custome against the common law, so a man may doe against such a statute; for as our author saith, *consuetudo etc. privat communem legem.* As the statute of *Magna Charta* provideth that no leet shall be holden but twice in the yeare, yet a man may prescribe to hold it oftener, and at other times; for that the statute is but in affirmance of the common law."[4] It will be noted that there are two parts to this statement. The first is an arbitrary rule for construing a statute without regard to intent, according to the form in which the intent is expressed. The second is an equally arbitrary rule for determining whether an act declaratory of the common law precludes immemorial custom without regard to intent, according to the form

willed that is spoken. Therefore, in legal transactions the words take effect entirely independent of the intention they are to express. The *verba* are efficacious, not merely to the extent that they express the *voluntas*, but, for the law, their literal meaning stands for *voluntas* itself." 2 Danz, Geschichte des Römischen Rechts, § 142.

[1] Gray, Restraints Alien., 2 ed., § 74 *b*.

[2] Paraiso *v.* United States, 207 U. S. 368, 372.

[3] Thring, Practical Legislation, 109. For legislative attempts to provide against this type of interpretation in advance with respect to particular statutes, see 38 Hen. VIII, c. 7, § 28; 22 Car. II, c. 1, § 13; N. Y. Code Civ. Proc. 1848, § 1.

[4] Co. Lit. 115 *a*.

of words used. Magna Charta, the example given, was expressly declaratory. Hence the form of expression, whether negative or affirmative, was not the criterion for determining the nature of the statute.

The first rule is very common in the books in the sixteenth and seventeenth centuries. Thus, in Earl of Southampton's Case,[1] Bromley, Serjeant, said: "If it be enacted by Parliament that the youngest son shall have appeal of the death of his father, that shall not exclude the eldest from his suit, because there are no words of restraint." In Townsend's Case,[2] Walpole, Catline, and Dyer argued to the same effect that "the words being spoken affirmatively here, may not obstruct the common law in its operation." Gerrard, Prideaux, and Dallison, *contra*, admitted the rule but said that the words used "making a new ordinance (although they are spoken affirmatively) contain in themselves a negative." The court took the latter view. In other words, the fact that the act was an innovation was a circumstance calling for a more liberal rule.[3] This more liberal statement of the rule by admitting that there may be an implied negative is to be found also in the argument in Stradling *v.* Morgan,[4] in Elmes's Case,[5] and in Jones *v.* Smith.[6]

But the original, strict form of statement is to be found as late as 1695 in Oldis *v.* Donmille.[7] And in 1760, in Rex *v.* Moreley,[8] the stricter form of the rule reappears under very peculiar circumstances. The question arose upon a rule for a *certiorari* to remove certain orders under the Conventicle Act, with which Lord Mansfield evidently had very little sympathy. The statute[9] provided that "no other court whatsoever shall intermeddle with any cause or causes of appeal upon this Act; but they shall be finally determined in the quarter sessions only." Also: "This act and all clauses therein shall be construed most largely and beneficially for the suppressing of conventicles, and for the justification and en-

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[1] 1 Dyer 50 *a*.

[2] 1 Dyer 111.

[3] Coke afterward stated the rule in this more liberal form with respect to statutes not declaratory: "A statute made in the affirmative without any negative *expressed or implied*, doth not take away the common law." 2 Inst. 200.

[4] 1 Plowd. 199, 206.

[5] 1 And. 71.

[6] 2 Bulstr. 36.

[7] Show. P. C. 58, 64. Here counsel say, *arguendo:* "'T is an affirmative Law and that seldom or never works any Change or Alteration in what was before."

[8] 2 Burr. 1041.

[9] 22 Car. II, c. 1, §§ 6, 13.

couragement of all persons to be employed in the execution thereof; and that no record, warrant or *mittimus* to be made by virtue of this act shall be reversed, avoided or in any manner impeached by reason of any default in form." The rule was opposed on the ground of these provisions. But, as the court pointed out, the *certiorari* would not try the merits but only the question whether the magistrates had exceeded their jurisdiction. It could be granted without allowing anything in the nature of a review and without passing on any "default of form." Hence the court directed that it issue. Counsel argued further, however, that "the general jurisdiction of this court is not taken away by mere negative words in an act of Parliament." To this the court assented, saying: "The jurisdiction of this court is not taken away unless there be express words to take it away." The statute here was so clear that if it was possible for legislation to take away the power of the court over a case by anything short of saying so in unequivocal terms, it surely had that effect. But on the rule for *certiorari* that was not the question. On the other hand, the rule in question was not universally conceded. In Lord Lovelace's Case[1] the question was whether a prescription to cut wood without view of the forester could be allowed. Coke's doctrine was cited, but the court refused to apply it. The report says: "And my Lord Richardson denyed that difference taken by my lord Coke in Com. on Litt. fol. 115, as betweene negative statutes declaratorie of the common law and negative statutes introductory of a new law, and he held against my lord Coke that in neither of the cases a prescription can be against a negative statute." On the whole, we may say that in the sixteenth and seventeenth centuries there was an arbitrary rule of construction requiring negative words to take away the effect of immemorial custom or the operation of common law,[2] which, however, was not universally admitted and was construed more liberally by many who held that the negative might appear from the general tenor of the act without an express statement thereof; that the portion of the rule relating to declaratory statutes did not afford a criterion for determining when a statute is declaratory, but a mode of construing a statute otherwise shown

[1] W. Jones 270.

[2] This rule was not confined to conflicts between statute and common law. In Bodwell *v.* Bodwell, Cro. Car. 170, 172, Noy says, *arguendo*, "and a statute in the affirmative *doth not take away a former statute*, but they stand together." Here is a crude statement of the law as to repeal by implication.

to be of that character, and that the fact that a statute introduced an innovation was regarded by those who adhered to the rule as entitling it to more liberal construction. In the eighteenth century the rule is announced *obiter* in its stricter form. In the nineteenth century, these cases are cited for the doctrine that statutes are to be taken so far as possible to be declaratory of the common law, and hence, when in derogation thereof, are to be construed strictly.

Another class of old authorities is also cited today as supporting the doctrine in question; namely, those which construe together common law and statute upon the same general subject as rules *in pari materia*. For instance, Coke says: "The surest construction of a statute is by the rule and reason of the common law."[1] In other words, it should be construed so as to fit into the legal system of which it is a part. Statute and common law should be construed together, just as statute and statute must be. This is what the minority judges had in mind in the much-quoted passage in Stowel *v.* Lord Zouch.[2] Exactly the same arguments were made as to the necessity of construing one statute by another.[3] It is apparent that these authorities do not require and are no warrant for a doctrine of judicial antipathy toward legislative innovation. The interpretation of these authorities as establishing a presumption of legislative intent not to interfere with the common law is a nineteenth-century one.[4] Such a presumption may in fact have been perfectly justified in a period of rare and scanty legislation. It may have been assumed as a known fact that the legislature did not profess to make considerable and sweeping changes in the law. But that does not make of it and the courts did not then take it to be a conclusive presumption, established by law, which a period of legislative activity could not affect.

But one reported case in England prior to the nineteenth century lays down the doctrine as it is stated today. Ash *v.* Abdy[5] was decided in 1678, but was not reported till 1819. It involved the question whether the Statute of Frauds was to be applied retroactively. The statute did not require any such con-

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[1] Co. Lit. 272 *b*.

[2] 1 Plowd. 353. See *infra*, p. 401, n. 2. *Cf.* Shipman *v.* Henbest, 4 T. R. 109.

[3] Bodwell *v.* Bodwell, Cro. Car. 170, 172.

[4] It appears first in 1 Kent Comm. 464 (1826).

[5] 3 Swanst. 664.

struction, and the ordinary criterion of the intrinsic merit of possible interpretations, or Blackstone's tenth rule, would suffice to justify the decision that it was not to be so applied. But Lord Nottingham is reported to have come to this conclusion "the rather because all acts which restrain the common law ought themselves to be restrained by exposition." It is curious that this dictum first saw light, nearly a century and a half after it was uttered, in the beginnings of the reform movement in England, when, in face of strong opposition from individual judges, Parliament was beginning to take a vigorous hand in making over the law. In this country the first announcement of it is in Brown *v.* Barry,[1] in 1797. A statute of 1789 had provided that the repeal of a repealing act should not revive the act repealed, and the point decided was that an act *suspending* a former act for a limited time was not a repealing act within this statute. In coming to this obvious conclusion, Ellsworth, C. J., said: "The act of 1789, being in derogation of the common law, is to be taken strictly." Nor does the doctrine appear in institutional writers till the nineteenth century. In Wood's Institutes (1722) the dicta in Bonham's Case are set out as a rule of construction, and it is laid down that "the surest construction is by the reason of the common law."[2] As we have seen, the latter statement meant, in the authorities from which it was taken, no more than that common law and statute *in pari materia* were to be construed together. Blackstone (1765) discusses interpretation of statutes at some length and sets out ten rules. He refuses to accept the dicta in Bonham's Case and makes no mention of statutes in derogation of the common law or of any rules with reference thereto. Kent (1826) says that statutes are to be construed with reference to the principles of the common law because it is not to be presumed "that the legislature intended to make any innovation upon the common law further than the case absolutely required,"[3] and cites the argument of the minority judges in Stowel *v.* Lord Zouch. Finally in 1854 in Bouvier's Institutes we find it stated as a fundamental principle that "statutes in derogation of the common law

[1] 3 Dall. (U. S) 365. The dictum in this case has been applied by the Supreme Court of the United States in McCool *v.* Smith, 1 Black (U. S.) 459, 490, and Show *v.* Railroad Co., 101 U. S. 557, 565.

[2] Wood, Inst. 9, citing 2 Inst. 148, 301 *a*.

[3] 1 Comm. 464. It should be remembered that Chancellor Kent had had some experience of democratic legislative activity, and was not at all in sympathy with it. Memoirs and Letters of Chancellor Kent, 178.

are to be strictly construed." [1] From this time the tide of decisions and dicta runs steadily. The rule is now a part of the *fundamenta* of American law.[2] In other words this wise and ancient rule of the common law is, in substance, an American product of the nineteenth century. The English institutional writers of modern times, Broom, Stephen, and Campbell, are unaware of it.[3] It does not appear in any institutional writer till 1854, and does not appear in any edition of Blackstone till 1870.[4] With quite as much warrant one may cite as the true and ancient doctrine of the common law the classical statement in Heydon's Case,[5] wherein a sound and liberal canon of construction was laid down for *all* statutes "be they penal or beneficial, restrictive or enlarging of the common law."

American courts, unrestrained by any doctrine of parliamentary supremacy, such as was established in England in 1688, found themselves opposed to legislatures, just as English courts of the sixteenth and seventeenth centuries had been opposed to the crown. They found in the books, over and above express constitutional limitations, vague doctrines of inherent limitations upon every form of law-making and of the intrinsic invalidity of certain laws. They soon wielded a conceded power over unconstitutional legislation. The great American institutional writer was an ardent federalist and had little faith in a popular legislature. The greatest of American judges, a man of like political sentiments, was not sure that "by general principles" legislatures were not bound to respect a *bona fide* purchaser for value as would a court of equity, and refuse to assert against him the rights of a defrauded people.[6] Thus American courts were predisposed to look doubtfully upon legislative innovations. But the determining factor in the attitude of our courts toward legislation is doubtless to be found in the coincidence of a period of development through judicial decisions with one of great legislative activity. Usually legislative activity

[1] 1 Bouvier, Inst., § 88. Citing three cases: Melody *v.* Reab, 4 Mass. 471; Gibson *v.* Jenney, 15 Mass. 205; Look *v.* Miller, 3 Stew. & P. (Ala.) 13. The first of these deals with a penal statute. The second is a dictum. The third is a typical case.

[2] The American editors of Blackstone were slow in recognizing it. Sharswood (1859) added five to Blackstone's ten rules without mentioning this point. Its first appearance in this connection is in Cooley's note to Blackstone's seventh rule, 1 Cooley's Blackstone, 88, n. 1 (1870).

[3] It is not mentioned in Terry, Common Law (1906).

[4] See notes 1 and 2, *supra*.

[5] 3 Reports 93.

[6] Fletcher *v.* Peck, 6 Cranch (U. S.) 87.

has succeeded juristic or judicial activity. With us they happened to be coincident. Roughly speaking, the first century of American judicature was taken up with determining the applicability of the several doctrines of the common law to this country and working out the potential applications of common law principles to American conditions. Hence it was marked by fresh and living juristic thought and vigorous judicial law-making. For once, legislation had to contend with living and growing law of the discursive type instead of with the feeble offspring of a period of juristic decadence.

If, however, we should concede that an attitude of antipathy toward legislative innovation is a fundamental common law principle, we should have to inquire whether that principle is applicable to American conditions and is a part of our American common law. "The capital fact in the mechanism of modern states is the energy of legislatures."[1] American legislatures have been conspicuously active from the beginning. Moreover, our constitutional polity expressly contemplates a complete separation of legislative from judicial power. And this is in accord with the whole course of legal history.[2] Not only is a doctrine at variance with that polity inapplicable to American conditions, but if it ever was applicable, the reasons for it have ceased and it should be abandoned. For one thing, the political occasions for judicial interference with legislation have come to an end. In the sixteenth and seventeenth centuries the judiciary stood between the public and the crown. It protected the individual from the state when he required that protection. Today, when it assumes to stand between the legislature and the public and thus again to protect the individual from the state, it really stands between the public and what the public needs and desires, and protects individuals who need no protection against society which does need it. Hence the side of the courts is no longer the popular side. Moreover, courts are less and less competent to formulate rules for new relations which require regulation. They have the experience of the past. But they do not have the facts of the present. They have but one case before

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[1] Maine, Early History of Institutions, Lect. xiii.

[2] "As the development of law goes on, the function of the judge is confined within ever narrowing limits; the main source of modifications in legal relations comes to be more and more exclusively the legislature." Sidgwick, Elements of Politics, 2 ed., 203. This is well illustrated in Campbell, Principles of English Law (1907), in which more than half the references are to statutes.

them, to be decided upon the principles of the past, the equities of the one situation, and the prejudices which the individualism of common law institutional writers, the dogmas learned in a college course in economics, and habitual association with the business and professional class, must inevitably produce.[1] It is a sound instinct in the community that objects to the settlement of questions of the highest social import in private litigations between John Doe and Richard Roe. It is a sound instinct that objects to an agricultural view of industrial legislation.[2] Judicial law-making for sheer lack of means to get at the real situation, operates unjustly and inequitably in a complex social organization. One might find more than one illustration in the conflict between judicial decision and labor legislation. But Dicey has pointed out a striking example in the operation of the equitable doctrines of separate property prior to the married women's acts. "The daughters of the wealthy," he says, "were when married, protected under the rules of equity in the enjoyment of their separate property. The daughters of workingmen possessed little property of their own. The one class was protected. The other would, it seemed, gain little from protection."[3] Whether the state exists only to secure "the individualistic minimum of legal duty," or to interfere with the activities of sane adults along paternal or even socialistic lines in the interests of the community at large, legislative law-making must be the chief reliance of modern society.[4]

But it is objected that statutes "have no roots" and are "hastily and inconsiderately adopted";[5] that they are crude and ill-adapted to the cases to which they are to be applied, and are unenforced and incapable of enforcement;[6] and that they "breed litigation,"[7] whereas, supposedly free from the foregoing defects, judge-made laws "rest on principles of right" and "are the slow fruit of long-fought controversies between opposing interests."[8] Very little reflection is needed to show how ill-founded these oft-repeated state-

[1] "It is not to be expected from human nature that the *few* should be always attentive to the interests of the *many*." 4 Bl. Comm. 379. One must not forget that counsel on both sides belong to the same class and have had the same training as the judges.

[2] Kelley, Some Ethical Gains through Legislation, 142.

[3] Law and Public Opinion in England, 382.

[4] Sidgwick, Elements of Politics, 2 ed., 343–344.

[5] Baldwin, Introduction to Two Centuries' Growth of Am. Law, 2.

[6] Carter, Law, Its Origin, Growth and Function, 3.

[7] Hornblower, A Century of Judge-Made Law, 7 Colum. L. Rev. 460.

[8] Two Centuries' Growth of Am. Law, 2.

ments are in fact. Dicey has shown that the married women's acts had very deep roots in the equity doctrines as to separate property.[1] Can we say that homestead and exemption laws, mechanics' lien laws, bankruptcy laws, divorce laws, wills acts, statutes abolishing the common law disqualifications of witnesses, permitting accused persons to testify, and allowing appeals in criminal causes, had no roots? Do any judge-made doctrines rest more firmly upon principles of right than these statutes, or than Lord Campbell's Act or Lord St. Leonards' Act or the Negotiable Instruments Law? Do the refinements of equity and the ultra-ethical impossibilities which the chancellors imposed upon trustees have deeper roots or represent right and justice better than trustees' relief acts? Are any judicial decisions more deliberately worked out or more carefully adjusted to the circumstances to which they are to be applied than the draft acts proposed by the Conference of Commissioners on Uniform State Laws or the National Congress on Uniform Divorce Legislation? What court that passes upon industrial legislation is able or pretends to investigate conditions of manufacture, to visit factories and workshops and see them in operation, and to take the testimony of employers, employees, physicians, social workers, and economists as to the needs of workmen and of the public, as a legislative committee may and often does? [2] Failures are not confined to legislative law-making. The fate of the fellow servant rule, of the doctrine of assumption of risk, and of the whole judge-made law of employers' liability, the Taff-Vale case in England,[3] and the fate of judicial adjustment of water-rights in America [4] should make lawyers more cautious in criticizing the legislature. Freaks of judicial law-making are abundant.[5] Spendthrift trusts are

[1] Law and Opinion in England, 369–393.

[2] See Kelley, Some Ethical Gains through Legislation, 156.

[3] [1901] A. C. 426. See 5–6 Edw. VII, c. 47, § 4.

[4] See Long, Irrigation, §§ 95, 98.

[5] It has been held that a verdict of guilty in the "fist" degree is of no effect, Wooldridge *v.* State, 13 Tex. App. 443, and this decision has been deemed of enough importance to be published as a leading case, 44 Am. Rep. 708. Also that a verdict assessing punishment in the "state penty" is fatally defective. Keeller *v.* State, 4 Tex. App. 527. Also that a verdict of "guity" is ineffectual. Taylor *v.* State, 5 Tex. App. 569; Wilson *v.* State, 12 Tex. App. 481; Harwell *v.* State, 22 Tex. App. 251. But a verdict of "guilly" or "guily" or "guitty" is good. Partain *v.* State, 22 Tex. App. 100; Currey *v.* State, 7 Tex. App. 91; Stepp *v.* State, 31 Tex. Cr. R. 753. What would be said of legislation that required such absurdities? For some further instances, decisions upon future interests in land in almost any of our jurisdictions may be referred to. See Zane, Determinable Fees, 17 HARV. L. REV. 297, 306.

In Indiana the plaintiff was required by judicial decision to negative contributory

as out of line with right and justice as any statute-made institution ever was.[1] The Exchequer rule as to reversal for error in admission of evidence, our American judge-made law of instructions to juries, our practice of new trials on the slightest provocation, and our whole pitfall-bestrewn practice in appellate courts are warnings of the evil possibilities even of judicial law-making. In short, crudity and carelessness have too often characterized American law-making both legislative and judicial. They do not inhere necessarily in the one any more than in the other.

Formerly it was argued that common law was superior to legislation because it was customary and rested upon the consent of the governed.[2] Today we recognize that the so-called custom is a custom of judicial decision, not a custom of popular action. We recognize that legislation is the more truly democratic form of law-making. We see in legislation the more direct and accurate expression of the general will.[3] We are told that law-making of the future will consist in putting the sanction of society on what has been worked out in the sociological laboratory.[4] That courts cannot conduct such laboratories is self evident. Courts are fond of

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negligence in his pleading. Mt. Vernon *v.* Dusouchett, 2 Ind. 586; Railroad Co. *v.* Burton, 139 Ind. 357. This had to be changed by statute. Burns, Annotated Stat., § 359 *a*. In Edmiston *v.* Herpolsheimer, 66 Neb. 94, it was held that presentment of a check through the clearing house was not presentment in a reasonable time. The legislature, in response to the demand of business men, changed the rule at its next session. See Reporter's note to case cited. Such instances might be multiplied indefinitely and are no less suggestive than the cases conventionally cited where statutes have failed of effect. Lists of overruled cases, moreover, are quite as long and quite as formidable as schedules of repealed statutes.

If the public refuse to obey statutes, it is no less true that juries systematically refuse to obey the rules of judge-made law laid down for their guidance in actions against carriers, against employers, and for personal injuries generally. See some statistics on this point in my paper, The Need of a Sociological Jurisprudence, 19 Green Bag 607. Judges have been known to lay down rules which were quite as unsuited to those who had to obey them as any statutes have been. To take remote and therefore non-controversial examples, see Petheram, English Judges and Hindu Law, 14 L. Quar. Rev. 392, 404, and 15 L. Quar. Rev. 173, 184; Petheram, The Mohammedan Law of Wakf, 13 L. Quar. Rev. 383; Andrews, Connecticut Intestacy Law, Select Essays in Anglo-Am. Legal History, 431, 446. It is instructive to note that the points made against the Judicial Committee of the Privy Council in the articles cited are made against our supreme courts today. Kelley, Some Ethical Gains through Legislation, 142–156.

1 See Gray, Restraints Alien., 2 ed., §§ 262–264.

2 1 Wilson's Works, Andrews' ed., 183 (written 1790).

3 Bosanquet, Philosophical Theory of the State, 120–123.

4 Ward, Applied Sociology, 338.

saying that they apply old principles to new situations.[1] But at times they must apply new principles to situations both old and new. The new principles are in legislation. The old principles are in common law. The former are as much to be respected and made effective as the latter — probably more so as our legislation improves. The public cannot be relied upon permanently to tolerate judicial obstruction or nullification of the social policies to which more and more it is compelled to be committed.

Roscoe Pound.

CHICAGO.

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[1] *E. g.*, Rensselaer Glass Factory *v.* Reed, 5 Cow. (N. Y.) 587, which has been quoted repeatedly.